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No. 88-1633

In The

Supreme Court of the United States

October Term, 1988

JACKSON WARREN,

Petitioner,

vs.

CITY OF LINCOLN, NEBRASKA, JAMES BREEN, SANDRA L. MYERS, and DAVID BEGGS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In a civil rights action is it proper for the Court of Appeals to apply an objective standard and determine that the arresting officers had probable cause for the arrest, despite the officers' subjective belief that probable cause was lacking.

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STATEMENT OF THE CASE

At approximately 4:30 A.M. on April 13, 1985, Lincoln Nebraska police officers responded to an attempted break-in near 15th and "C" Streets in Lincoln, Nebraska. A man described as a slender white male, early 20's, white short-sleeved shirt (R 207:18-20; 243:8-10; Ex. 10) had tried to get in a second story window to an apartment, and was frightened away by the apartment's occupant. The intruder fled on foot toward the east (R 240:21-241:1).

Detective Sergeant David M. Beggs arrived at the apartment to dust for fingerprints and to assist the officer

in charge of the investigation (R 245:5-246:6). Officer Scott Alexander brought his police dog, Shane, to the scene (R 436:1-15). Officer Sandra Myers heard the call and came to assist (R 180:19-20).

Officer Alexander put Shane on the scent where the intruder had reportedly been. Shane began tracking east - in the direction the intruder was seen fleeing (R 436:25-437:9). Shane tracked eastward toward the area mid-block between 19th and 20th Streets - four blocks and a few minutes from the crime (R 437:20-21). Shane continued tracking toward and up to the car occupied by Petitioner, Jackson Warren (R 438:18-439:5; 440:21-23). Mr. Warren started his car and pulled into a driveway in order to turn around and leave the area (R 52:5-8). He fit the general description of the intruder (R 209:2-4).

Officer Alexander "flagged down" Mr. Warren and asked for identification. Mr. Warren was asked to wait momentarily, and Officer Myers had by this time arrived in the area to assist. Officer Alexander then tried to put Shane back on a tracking scent, but Shane would neither track any further, nor leave the area (R 181:13-15; 441:18-442:9). This was not Warren's neighborhood of residence, and he was crying at the time of the stop.

Officer Myers obtained Mr. Warren's driver's license and ran a computer check from her squad car (R 186:16-21; 187:23-24). The check revealed an arrest warrant for Mr. Warren for his failure to appear on traffic offenses (R 190:14-25). Mr. Warren was arrested and taken to the jail complex in Officer Myers' squad car. He was not handcuffed (R 56:12-13) or interrogated. A brief "pat-down" of the outer clothing was performed before Mr.

Warren got into the squad car (R 195:12-15). While riding in the squad car, Officer Myers mentioned a prowling incident to Mr. Warren (R 48:23-49:1).

Upon arriving at the jail complex, Officer Myers "checked in" her charge and contacted Detective James Breen. Detective Breen, a 14-year veteran on the police force, was described by Police Chief B. Dean Leitner as an outstanding criminal investigator, an asset to the force, and responsible for the solution of many very serious crimes (R 150:2-12). Detective Breen had been working for several months on a series of break-in/sexual assault crimes. These crimes were sufficiently similar that Detective Breen believed the same person might be responsible for all of them. The crimes were in specific geographical locations, and they took place in the early hours of the morning between midnight and 5:00 A.M. In most instances, entry was gained or attempted through a second-floor window, and the intruder, a young white male, had sometimes been frightened away once the victim awoke (R 198:24-199:1-5). The reported crime of April 13, 1985, was similar in several respects (R 267:17-269:2; 376:13-23).

Detective Breen decided to talk to Mr. Warren. He asked him a few standard questions: name, address, phone number, general background information. Mr. Warren answered these questions. Detective Breen took notes and told Mr. Warren he was being questioned in connection with some prowling incidents (R 326:8-25; Ex. 4). Detective Breen intended to gain general information about Mr. Warren in the event a personality profile in the various sexual crimes under investigation was later obtained. Detective Breen felt a conversation with Mr.

Warren might eliminate or confirm him as a suspect (R 313:2-19).

Mr. Warren expressed a desire to contact his parents' attorney. Detective Breen replied that Warren "didn't have a right to an attorney yet" (R56:25), that he was not being accused of anything, and that Warren didn't have to talk to Breen if he didn't want to (R 202:5-7; 384:8-11). Warren decided to answer Breen's questions because he was concerned about getting out of the police station in sufficient time to get to work the next day (R 69:10-13). Detective Breen did not intend to elicit any incriminating information from Mr. Warren, and did not obtain anything incriminating (R 64:8-12).

The conversation between Breen and Warren encompassed only a brief personal history, a brief explanation of Mr. Warren's activities over the past twelve hours, and a brief explanation of Mr. Warren's activities in the area when he was arrested (Ex. 4). The conversation was interrupted several times when Sergeant Beggs asked Mr. Warren to show him his hands or his shoes. Officer Beggs had earlier fingerprinted the crime scene and made physical observation of the area (R 245:16-17). He was looking for any trace evidence of the crime that may be present on Mr. Warren's shoes or body (R 253:1-16).

Detective Breen then took Mr. Warren to the police department for fingerprinting and photographing (R 362:23-363:4). At no time was Mr. Warren handcuffed or actually jailed. A set of fingerprints and photographs were taken (R 225:18-25). Several days later, the fingerprints were checked against the break-in crime scene at 15th and "C" and did not match. They were also checked

against one of the break-in/sex crimes that Detective Breen was investigating, and did not match (R 397:2-398:14; Ex. 3). The photographs were never used (R 396:13-14; 403:13-15; 379:5-7).

Mr. Warren was released after posting bond. The entire matter, from the initial stop to the release, lasted approximately two and a half hours. Mr. Warren later pleaded guilty to the charges which had generated the arrest warrant, and then filed this lawsuit.

SUMMARY OF ARGUMENT

It is the Respondents' position that this case involves a factual determination that there was probable cause for the arrest of Warren on the break-in charge. The dissent in the Court of Appeals does not result from a materially different view of the law but rather from a different view of the conclusion to be drawn from undisputed facts. There is no compelling issue of constitutional law, no split in the circuits and no reason for the Court to take this case.

Since an arrest is a deprivation of liberty, there can be no "second arrest" of one who is already in lawful custody. The arrest warrant in this case provides the basis for lawful custody. No additional legal basis to deprive Jackson Warren of his liberty is needed in view of that warrant. This is true even though the arresting officers also considered him a suspect in another and unrelated crime, the break-in. Nebraska law allows the taking of physical

characteristics such as finger and palm prints and photographs from those lawfully arrested. As Warren was lawfully arrested on the traffic warrant, such items could be taken from him, even though the officers' motives in doing so were to use them to try to establish Warren's guilt or innocence of a crime unrelated to the traffic warrant.

Where the issue of probable cause for an arrest on the break-in was explored at trial and Warren's attorneys had ample opportunity to introduce evidence on the issue, it is not an abuse of discretion for the Court of Appeals to consider and decide the issue. Where the facts surrounding probable cause are uncontroverted, the court should decide the issue as a matter of law, particularly when the decision is necessary to resolve the officers' qualified immunity defense. Probable cause to arrest on the break-in is an objective matter and it may be found to exist, even though the police officers thought otherwise.

Detention upon reasonable suspicion is lawful and if there is a lawful preceding arrest, such as on a warrant, then the only constitutional inquiry is whether the scope and nature of the detention is reasonable. This was submitted to the jury and resolved against the petitioner.

When the courts are unable to agree as to what the law is concerning an undisputed set of facts, then it cannot be said that the right at issue was clearly established. Accordingly, a police officer cannot be monetarily liable under 42 U.S.C. §1983, which has as its fundamental pre-requisite the violation of a clearly established constitutional right.

The Court of Appeals properly decided this case and the writ of certiorari should be denied.

ARGUMENT

I.

INTRODUCTION

Petitioner seeks certiorari in this civil rights action against three police officers and their employer, The City of Lincoln, Nebraska. The trial resulted in a defendants' jury verdict when tried in February, 1986, before District Judge Warren K. Urbom. A three-judge panel of the Eighth Circuit Court of Appeals reversed and remanded. That panel opinion was automatically set aside when the court took the case for en banc hearing. The Eighth Circuit Court of Appeals, en banc, affirmed the District Court verdict in favor of all defendants.

Petitioner now seeks further review from this Court. It is submitted at the outset that the petitioner fails to show any reason why this case warrants the time and consideration of the Supreme Court of the United States. The en banc opinion from which appeal is sought simply finds as a factual matter that there was probable cause for the arrest of Jackson Warren and applies several well-known and established principles. The question before this Court on the writ, and the only one despite petitioner's listing of six questions, is whether the Eighth Circuit Court of Appeals properly decided that there was probable cause for Jackson Warren's arrest for an attempted break-in on the night of April 13, 1985, in the area of 15th and "C" Streets in Lincoln, Nebraska. If there

was probable cause, as the appellate court found, then petitioner's claims simply evaporate. Clearly, the Court of Appeals determined the issue which resolved the entire case, thereby dispensing with the need to discuss secondary or peripheral issues.

II.

ARREST IS THE DEPRIVATION OF LIBERTY AND WHEN AN INDIVIDUAL IS ARRESTED, HE CANNOT BE ARRESTED A SECOND TIME SINCE HIS LIBERTY HAS ALREADY BEEN LOST.

Jackson Warren was arrested on a traffic warrant. The preceding stop, as well as the warrant, were conceded to be valid. The location of Warren at the time he was found by the Lincoln police officers also made him a suspect in a break-in which had occurred minutes earlier, 4½ blocks to the east. He was found by a tracking dog east of the crime scene, the same direction in which the intruder was seen fleeing the crime scene. He was found at 4:30 A.M. in a residential area, attempted to flee as the police approached, and his physical description and clothing matched the intruder's. An identification check turned up a warrant for his arrest. He was therefore arrested on the warrant and neither the warrant, nor the arrest thereunder was ever challenged at any stage of this lawsuit.

Petitioner asserts that in order to detain him to question him relative to the break-in which had occurred within blocks and within minutes of his location or to take photographs and prints, or to look for trace evidence, the officers needed to have probable cause to arrest him for the break-in. In other words, petitioner seems to assert that the time spent answering questions

about his whereabouts or being mugged and printed is in reality a "second arrest" which can only occur if there was probable cause for that "second arrest."

Petitioner's notion is flawed. First, this is a Section 1983 case and therefore the ultimate inquiry is whether there was a violation of a "clearly established constitutional right" by the defendant police officers. Petitioner fails to point to any such clearly established right in this case which was violated. Petitioner's battle cry that "one cannot be arrested without probable cause," is meaningless in a fact specific inquiry where the petitioner is already under arrest with an unchallenged warrant. Justice Scalia said in *Anderson v. Creighton*, 97 L.Ed.2d 523 (1987):

> [T]he right the official is alleged to have violated must have been "clearly established" . . . in the light of pre-existing law. The unlawfulness must be apparent.

At 531.

Thus, petitioner must point to a doctrine which holds that there is in fact a "second arrest" under the facts of this case, and secondly, that there must be probable cause supporting such a "second arrest" irrespective of the existence of the unchallenged warrant. Thirdly, petitioner must show that there was not probable cause for the "second arrest." Finally, petitioner must show each of the foregoing elements were clearly established at the time the respondents contacted Jackson Warren. The Court of Appeals did not err in resolving these issues against petitioner.

The Court of Appeals, in an opinion authored by two of the judges who dissented from the en banc opinion in

the instant case, answered the first issue in *Garionis v. Newton*, 827 F.2d 306 (8th Cir. 1987), where the plaintiff claimed that there needed to be probable cause for his second arrest by a second officer. The court disagreed:

> The flaw in this argument is that a person who is already under arrest and in police custody cannot be "re-arrested." An arrest presumes that the person arrested was at liberty, free from police custody, before the arrest. This premise does not hold where the subject is already in custody of law enforcement officers.

Id. at 310.

Significantly, the court also found in Garionis that there was no real dispute over the facts relating to the arrest and that Newton had probable cause to arrest him. As there was probable cause to arrest, no clearly established rights were violated and both defendants were entitled "as a matter of law, to qualified immunity from damages." Garionis also supports the majority's determination here that probable cause could be determined as a matter of law by the court as the circumstances surrounding the arrest were fully developed and were not controverted.

The Nebraska Supreme Court has reached the same conclusion in a case which is nearly factually identical to the instant matter. *State v. Starks*, 229 Neb. 482, 427 N.W.2d 297 (1988). There, Starks was under arrest and in custody on traffic warrants when homicide officers took him from his cell to another police station, where he was questioned about and ultimately confessed to the homicide they were investigating. Starks later challenged the confession on the ground that it was procured as a result

of an illegal arrest. The Nebraska Supreme Court distinguished *Dunaway v. New York*, 442 U.S. 200 (1979), expressly following the holding of *Garionis*, and said:

> The defendant's assignment of error fails because he was not arrested by Officers Wilson and Nutsch when he was taken to Omaha police headquarters for questioning. Since there was no new arrest, legal or otherwise, his confession was not the fruit of an illegal arrest, and the trial court did not err in refusing to suppress the confession.

Starks at 487 N.W.2d at 300.

It is suggested that being arrested is a definite condition: either you are arrested or not. Former Chief Justice Burger suggested the same concept in his concurring opinion in *Adams v. United States*, 399 F.2d 574 (D.C. Cir. 1968). He closed his opinion by saying:

> The reason for requiring probable cause for an arrest is to protect against arbitrary interference with liberty. When the condition of custody already exists, however, the constitutional requirement of an arrest on probable cause would be totally superfluous - a sheer ritual serving no legitimate protective function.

Id. at 581.

However, in the instant case, the Court of Appeals did not need to reach the issue of whether there was a second arrest which needed to be supported by probable cause, independent of the warrant for failure to appear. Instead, the court went directly to the heart of the matter and found that in any event the officers did have probable cause to arrest Warren for the break-in. As a result, all other issues regarding length of detention and the taking of physical characteristics were properly resolved against petitioner Warren as lawful actions incident to a lawful

arrest. It was and remains unnecessary to reach any so-called "second arrest" issues.

III.

UNDER NEBRASKA LAW, IDENTIFYING PHYSICAL CHARACTERISTICS SUCH AS PRINTS OR PHOTOS MAY BE TAKEN FROM ONE LAWFULLY ARRESTED, AND IN A CIVIL RIGHTS ACTION, THE MOTIVE OF THE OFFICER TAKING THE ITEMS IS IMMATERIAL.

That Jackson Warren was lawfully arrested on the traffic warrant is a matter about which there can be no question. The Nebraska Physical Identifying Characteristics Act, Neb. Rev. Stat. §29-3301 et seq. (1985), authorizes finger and palm prints and photographs of those "lawfully arrested." Under this statutory authority, it was clearly lawful to mug, print, and photograph Warren. This is true even though the results of taking those identifying characteristics could rule him in or out as a suspect in the break-in. Likewise, the fact that the officers' true intentions may have been to use those items to rule him in or out as a suspect in the break-in is simply immaterial. Warren was lawfully arrested on the warrant and his physical characteristics could be taken under the Nebraska statute, as well as under *Schmerber v. California*, 384 U.S. 757 (1968) (physical characteristics are not testimonial).

In civil rights litigation, police officers' intentions and motives are immaterial: their actions are to be judged on an objective basis. *Anderson v. Creighton*. In *Baker v. McCollan*, 439 U.S. 1114 (1978), now Chief Justice Rehnquist pointed out that the first inquiry in any Section 1983

suit is whether there has been a deprivation of a right secured by the "Constitution and laws . . ."; and it was held that if there had been no such deprivation, the state of mind of the defendant was wholly immaterial. That principle is directly applicable here. *See, Heine v. Connelly*, 644 F.Supp. 1508 (D.C. Del. 1986). Accordingly, if it was lawful to take the identifying characteristics, as it was, then the officers' motives in doing so were immaterial. The taking of these things cannot be evidence of a constitutional violation.

IV.

IT IS A MATTER OF DISCRETION FOR THE APPELLATE COURT TO DETERMINE THE ISSUES IT SHALL HEAR AND DECIDE, AND WHEN THE OPPOSING SIDE HAS HAD AN OPPORTUNITY TO DEVELOP EVIDENCE ON THE ISSUE AT TRIAL, IT IS NOT ERROR FOR THE APPELLATE COURT TO HEAR THE ISSUE.

The majority of the Court of Appeals found that the appeal could be easily resolved by determining if there was probable cause to support an arrest on the break-in charge. The court did not say that probable cause was needed under the circumstances of this case, but simply found that it was present. Thus the case was completely resolved by that conclusion. This is a factual determination and the Court of Appeals properly exercised its discretion to consider that issue on rehearing. Petitioner claims that it is reviewable error for the Court of Appeals to consider the matter of probable cause for an arrest on the break-in for the first time at rehearing en banc. It is submitted that this is a misapprehension of the law.

Singleton v. Wulff, 428 U.S. 106 at 120-121 (1976), sets forth the doctrine that issues to be taken up on appeal for thefirst time are matters for the "discretion of the court of appeals, to be exercised on the facts of the individual case." One of the primary considerations under Singleton is whether the opposing party has had an opportunity to adduce evidence on the issue.

The minority opinion mistakenly says Warren had no opportunity to develop facts relating to the probable cause defense. This is simply incorrect. Lincoln Police Department Officers Myers (R 168), Beggs (R 221) and Breen (R 279) were called to the stand by petitioner. The dog handler was called by respondent (R 430) and cross-examined by petitioner (R 443). There was full opportunity to explore the facts relating Warren's connection to the break-in.

It is difficult to point to one specific citation from the record in this case to establish that petitioner Warren had his opportunity on the issue of probable cause for an arrest on the break-in. The reason is simply that this is basically what the whole trial was about. What happened at the break-in location, the dog track, the finding of Mr. Warren, why he was taken into custody, and the questions asked of him all were explored at trial. The officers' motivation, to the extent it was even material, was fully and completely explored, as were each and every one of their actions. It is sufficient to say that the record is full of evidence of the facts upon which a determination of probable cause for an arrest on the break-in could have been made. Petitioner's attorneys obviously anticipated that the litigation encompassed the probable cause issue, as they submitted proposed jury instructions which dealt

with probable cause. (See Transcript p. 32, Plaintiff's Proposed Jury Instructions No. 7 and 8.)

The dissenting opinion in the instant case, *Warren v. City of Lincoln, Nebr.*, 864 F.2d 1436 (8th Cir. 1989), acknowledges that the court may determine probable cause without submission to the jury and quotes *Linn v. Garcia*, 531 F.2d 855 (8th Cir. 1976):

> Where the facts are in dispute or where they are subject to different inferences, the question of probable cause is for the jury; however, *where the facts are not disputed or are susceptible to only one reasonable inference*, the question is one of law for the court.

Linn at 861 (emphasis added).

Unfortunately, the dissent has taken the disjunctive holding of *Linn* and turned it into a conjunctive test. *Warren* at 1444. This is not correct, as the dissent of Judge Heaney fails to follow the rule from *Linn* that there are two different circumstances in which the court can properly determine the issue.

Accordingly, as the probable cause issue was raised and litigated at trial, it was certainly fair game at the appellate level. Counsel for petitioner cannot deny that their position throughout this matter has been that there must have been probable cause for the "second arrest" as well as for the detention, questioning, and fingerprinting relative to the break-in. That being the case, it is hardly surprising that respondents argued that additional probable cause was not necessary since Warren was already lawfully arrested, but that in any event probable cause existed for an arrest on the break-in, when judged on an objective basis.

V.

WHEN THE FACTS ON PROBABLE CAUSE ARE UNCONTROVERTED, THE COURT SHOULD DECIDE PROBABLE CAUSE AS A MATTER OF LAW IN A 42 U.S.C. §1983 ACTION WHERE THE POLICE OFFICER IS ENTITLED TO THE DEFENSE OF QUALIFIED IMMUNITY.

The law is clear that probable cause is now an objective matter and that what the officer thought has little to do with it. This is consistent with the shift found in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), from a subjective good faith defense for police officers to qualified immunity where plaintiff must show a violation of a clearly established constitutional right before liability can be imposed. *Anderson v. Creighton* makes it abundantly clear that the inquiry is the objective reasonableness of the officers' search or seizure decision. There Justice Scalia wrote:

> The general rule of qualified immunity is intended to provide governmental officials with the ability 'reasonably [to] anticipate when their conduct may give rise to liability for damages.'

At 534.

The objective standard seeks that goal. The police officer on the street should not be obligated to guess at the nuances of constitutional law at his financial peril, and should be required to respond in damages only when he transgresses clearly established constitutional law.

The Court of Appeals majority in this case did nothing more than apply that objective standard to the issue of whether there was probable cause to arrest Warren for

the break-in. The involved police officers had honestly and freely admitted at trial that they did not believe that they had probable cause to arrest. However, as pointed out by the Court of Appeals' majority opinion, courts have frequently overruled the officers' determination that he had probable cause and therefore consistency demands that the courts find probable cause, under an objective standard, even though the officer felt otherwise. In short, it is an objective standard, and it remains so, irrespective of whether the officer thought he did or did not have probable cause. Fairness to the officer on the street demands that consistency.

The majority applied the proper test and concluded that the facts surrounding Warren's arrest were not disputed. That conclusion has more than ample support in the record. The majority opinion recited the uncontroverted facts upon which probable cause rested:

> A man reported that a slender white male in his early 20's wearing a white short-sleeved shirt had tried to gain entry into his second-floor apartment by attempting to force open a window. The victim saw the intruder running from the apartment to the east. Officer Alexander who had arrived at the scene within five minutes put his tracking dog on the intruder's scent. The dog led the officers to Warren's car, parked 4½ blocks east of the scene of the attempted burglary. The police had received the call only 11 minutes earlier. It was 4:30 A.M. in a residential neighborhood with only one other person in the general area. Warren is a slender white male who was 19 years old and wearing a light colored short-sleeved shirt. As the officers approached his car, Warren attempted to drive away. We believe that

> these facts and circumstances would warrant a prudent person in believing that Warren was the intruder.

Warren, 864 F.2d 1436 at 1440.

It is important that the standard is not to dissect each element or fact standing by itself, but rather to look at the "cumulative effect of the facts in the totality of the circumstances." *United States v. Archer*, 840 F.2d 567 (8th Cir. 1988). The facts relied upon by the majority were uncontroverted and supported a finding of probable cause even though the officers had honestly and cautiously said that they did not believe that they had probable cause. Petitioner (and the dissent as well) fail to demonstrate any controversy about the existence of the basic facts cited above.

The dissent does not seem willing to even concede that an objective standard is appropriate to analyze probable cause, when that clearly is the law. *Anderson v. Creighton*. Here, the dissent uses a subjective standard to attack the majority when it says:

> A jury could reasonably draw the conclusion that the description of the intruder was too general, the dog track too unreliable and the attempt to leave the area too ambiguous to constitute objective evidence of probable cause.

Warren, 684 F.2d 1436, at 1445.

These are merely subjective descriptors for the dog track, the physical description, and the attempt to leave. They are not necessarily accurate descriptors, as it is equally plausible to conclude, as did the majority, that these elements were specific and reliable enough for

probable cause in the context of a §1983 lawsuit. However, under the standard of *Linn v. Garcia*, it is not the characterization of the facts that determines whether the court properly decides probable cause as a matter of law. Rather, if the facts are uncontroverted, then the court determines probable cause. The facts here are uncontroverted. There is simply no dispute anywhere in this record about the facts that a break-in had occurred, that a description had been given, that the time lapse between events was short, that the dog had tracked to Warren's car, that Warren was physically similar to the description, and that he attempted to flee an essentially deserted residential area at 4:30 in the morning. Different people might draw different ultimate conclusions from those facts. However, the facts themselves are not disputed. When the facts are undisputed, the concepts of qualified immunity as defined by *Harlow* and *Anderson* contemplate that the court will initially scrutinize the facts so as to avoid trial unless there has been the violation of a clearly established constitutional right. Thus it was entirely proper for the majority of the Court of Appeals to decide probable cause as a matter of law.

It is submitted that there is no large, significant or novel constitutional issue at work here; this is simply an appellate court that has split in its view of the conclusion to be drawn from a set of uncontroverted facts surrounding the stop and detention of Jackson Warren.

VI.

THERE IS NO CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT WHICH WAS VIOLATED BY ANY OF THE RESPONDENTS.

In the three years of appeals since verdict, it would seem that the ultimate issue has become obscured. That is whether Officers Beggs, Breen or Myers violated a clearly established constitutional right possessed by Jackson Warren.

It is meaningless to say that the clearly established right at issue is that probable cause is needed for an arrest. That is well known. Here, an arrest occurs pursuant to an unchallenged warrant. That a proper stop occurred under *Terry v. Ohio*, 392 U.S. 1 (1968), is beyond discussion. The mugs, photos, and prints taken from Mr. Warren at the police station are clearly lawful under the Nebraska Physical Identifying Characteristics Act, supra. They could have been taken had there been no break-in. The officers' intention in taking the characteristics is immaterial. Nor can that which is objectively lawful be used to prove a "pretext" in a §1983 case, despite the now voided Panel opinion to the contrary.

The sum and substance of this case is that there is no constitutional doctrine that a "second arrest" had occurred under these facts; nor is it established that probable cause would be needed for such a second arrest; nor is it established that probable cause was lacking. Finally, none of these three propositions meets the test of being clearly established. Accordingly, the majority opinion of the Court of Appeals is correct. That court properly examined the uncontroverted facts to determine if probable cause was present and therefore the "second arrest"

issue becomes moot. The United States Supreme Court should not grant certiorari to review what is merely a factual disagreement of the Eighth Circuit Court of Appeals.

VII.

DETENTION IS MATERIALLY DIFFERENT THAN AN ARREST, AND DETENTION AND QUESTIONING ON REASONABLE SUSPICION IS LAWFUL SO LONG AS THE LENGTH OF DETENTION AND THE SCOPE OF QUESTIONING ARE REASONABLE UNDER THE PARTICULAR CIRCUMSTANCES.

The petitioner asserts that this Court should grant the writ because otherwise Nebraska citizens will be subjected to unlawful detention without probable cause for investigative purposes when they are stopped for traffic offenses. This over-dramatizes any issue in the case, ignores the factual realities of the lawsuit, and ignores established law.

The specter of doom raised for those who traverse Nebraska highways is allegedly because of "the unconstitutional custom of the City training her officers to detain traffic warrant arrestees for questioning on unrelated felony offenses on a mere showing of 'reasonable suspicion'." (Petitioner's brief, p. 29). The first problem with the assertion as a ground for granting certiorari is that it is in fact a reasonably accurate statement of the law. Under *Terry v. Ohio*, citizens, be they traffic arrestees or on foot, can be detained for a limited time and for limited purposes on a "mere showing of reasonable suspicion." Probable cause is simply not required for a *Terry* stop.

In this case, there was reasonable suspicion, based on articulable facts, for the initial stop of Jackson Warren. Given the uncontroverted facts, a police officer would have to be dead, asleep, or an idiot not to stop Warren for "further investigation." Further investigation at the location of the stop revealed that there was an arrest warrant for him. He was arrested and taken into custody. As a factual matter, the Court of Appeals found on the basis of the uncontroverted facts that probable cause also existed at the same time for an arrest on the break-in.

In *United States v. Sokolow*, 49 CCH S.Ct. Bull. B2003 (April 3, 1989), *Terry* was reaffirmed. Once again, it was recognized that all facts must be considered together in the context of the circumstances. It was pointed out that:

> Indeed, *Terry* itself involved a 'series of acts, each of them perhaps innocent' if viewed separately, 'but which taken together warranted further investigation . . . ' '[I]n making a determination of probable cause the relevant inquiry is not whether a particular individual is "innocent or guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.' That principle applies equally well to the reasonable suspicion inquiry.

Id. at 2012-13 (citations omitted).

Therefore, to the extent that traffic warrant arrestees are in fact detained for questioning on unrelated felony offenses on a mere showing of reasonable suspicion, that practice of the Lincoln Police Department is entirely consistent with the law as set forth in *Terry* and *Sokolow*. Accordingly, there is no "custom" of unlawful questioning or detention of traffic arrestees in the City of Lincoln which needs correcting through this appeal. Questioning

upon reasonable suspicion is legal. Detention upon reasonable suspicion is legal. It is the length, nature, and scope of the detention and questioning that become the relevant constitutional inquiry. These were submitted to the jury here. As stated in Judge Urbom's Memorandum and Order of February 26, 1986, (Transcript p. 38) the issue of whether he was "detained too long was presented to the jury. . . ." (See Due Process of Law Instruction, Transcript p. 45.) Petitioner's assertion about the so-called customs of the City of Lincoln and its police officers is basically meaningless because it is a broad, general statement of the law, which happens to be essentially correct.

This decision of the Court of Appeals blazes no new trails, does not boldly depart from established law, is not in conflict with the law of other circuits, and is not clearly wrong. The decision is simply a factual determination of whether probable cause existed. The court was split, not on the facts, but on the conclusion to be reached from them. As the underlying facts were uncontroverted, it was proper for the Court of Appeals' majority to resolve the issue of probable cause as a matter of law.

VIII.

AN ARRESTEE HAS NO CONSTITUTIONAL RIGHT TO HAVE MIRANDA WARNINGS GIVEN TO HIM AND THERE IS NO 42 U.S.C. §1983 ACTION FOR ANY SUCH FAILURE TO WARN.

Petitioner raises an issue relating to assistance of counsel. This is a non-issue, as obviously there were no adversarial judicial criminal proceedings instituted against Warren with respect to the break-in. Thus, the

right to counsel had not yet attached. *See, Kirby v. Illinois*, 406 U.S. 682 (1972). There is no constitutional right to *Miranda* warning. *Hampton v. Gilmore*, 60 F.R.D. 71 (E.D. Mo.) aff'd 486 F.2d 1407 (8th Cir. 1973). The majority opinion of the Court of Appeals reached the same conclusion and the dissent did not disagree. It is therefore submitted that the issue of right to counsel and Miranda warnings have been resolved and need no attention through a writ of certiorari.

IX.

WHEN THE COURTS CANNOT AGREE ABOUT THE LAW APPLICABLE TO AN ESSENTIALLY UNDISPUTED FACT SITUATION, THEN THE LAW IS NOT CLEARLY ESTABLISHED TO THE POINT THAT §1983 LIABILITY CAN BE IMPOSED ON A POLICE OFFICER.

This lawsuit began with the filing of the Complaint on August 16, 1985. Trial was in February, 1986, and the last three years have been spent in the appellate system. The Panel's opinion was that the issue of pretextual arrest should have been submitted to the jury. *Warren v. City of Lincoln, Nebr.*, 816 F.2d 1254 (1987), *vacated*, 864 F.2d 1436 (1989). The Panel used the prints, the photos, and the mug shots as evidence of pretext which should have gone to the jury so that they could decide whether the officers' true motives in arresting him on the warrant was to secure evidence regarding the break-in. This was patently wrong because it injected the subjective content of the officers' minds back into the case, contrary to *Harlow* and *Anderson*, and did so in a case where the arrest warrant required Warren's arrest irrespective of the officers' intentions, thoughts, or motives. Once he was found, he

was to be arrested. It was that simple. For purposes of §1983 litigation, actions which are objectively lawful are not made unconstitutional, by the officers' thoughts, be they pure or nefarious. The Court of Appeals obviously recognized the underlying deficits in the Panel's opinion and voided it by granting en banc rehearing. At the rehearing en banc, four judges held probable cause for an arrest existed as a matter of law. The concurring judge would have affirmed because the arrest on the warrant was concededly lawful, the issue of the length of detention was submitted to the jury and the officers did not violate clearly established constitutional rights.

The four dissenters argued that a jury could reasonably conclude that the description of the intruder was too general, the dog track too unreliable, and the attempt to leave too ambiguous to constitute "objective evidence of probable cause." Thus, they would have reversed.

After three years of analysis, study, argument, disagreement, opinions and dissents, some think there was objective probable cause and that any resulting detention was lawful. Other judges apparently disagree. Remembering that it is the police officers' monetary liability to Jackson Warren which is at stake here, it is well to recall Justice Scalia's words in *Anderson v. Creighton*:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

97 L.Ed. at 531 (citations omitted).

Accordingly, it does not seem unfair to ask where this leaves Detective Breen, Sergeant Beggs, and Officer Myers. How can they be personally liable for violating a constitutional right which is allegedly clearly established, when three years of litigation have failed to produce agreement among nine judges of the Court of Appeals on whether a clearly established constitutional right was violated. This is no criticism of the Court of Appeals. Instead, it points out the impossibility of expecting the police officer on the street to divine in a matter of minutes what eminently qualified, experienced, and trained legal minds cannot agree upon after wrestling with the matter for years. Thus, Breen, Beggs and Myers did not infringe any clearly established right during their brief contact with Jackson Warren. He was taken into custody under a lawful warrant, the physical characteristics were taken under Nebraska statute, and the only jury issue, (the length of the detention) was decided adversely to petitioner. The case does not deserve certiorari, and the respondents respectfully ask the Court to end the case by denial of the writ.

CONCLUSION

This case has been tried to a District Court jury and examined during two appellate proceedings in the Eighth Circuit Court of Appeals. There is a record of uncontroverted facts which clearly supports the conclusion that the officers had probable cause to arrest Warren for the break-in, even though the officers' honest and sincere opinion was that they did not have probable cause. Whether there was a "second arrest" was not decided by

the Court of Appeals, as it was unnecessary for a complete resolution of the case. An arrest is an arrest, and once it has occurred, liberty is already lost. At that point, the constitutional issues become the length and conditions of the detention. Here, there was an admittedly valid arrest on an unchallenged warrant, and the length of the detention was submitted to the jury and resolved against Warren as being reasonable.

Police officers are only liable for violations of clearly established constitutional rights. Where three years of litigation fail to generate agreement among the judiciary, it is impossible to say that rights were clearly established to the point that the police officers are liable. The finding of probable cause by the Court of Appeals is a factual determination. It neither changes old law nor makes new law. This case simply represents a factual disagreement in the Eighth Circuit which does not require resolution by the highest court in the land. This case does not have the requisite constitutional scope to justify certiorari. Therefore, respondents respectfully request that the writ be denied.

Respectfully Submitted,

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